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DALLAS COUNTY
DISTRICT ATTORNEY
JOHN VANCE

RQ-183

August 30, 1991

RECEIVED
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Opinion Committee

Dan Morales
Attorney General of Texas
Box 12548, Capitol Station
201 West 14th Street, Suite 800
Austin, Texas 78701

RE: Request for Attorney General's opinion

Dear General Morales:

At the request of the Dallas Bar Association and pursuant to the provisions of Tex. Gov. Code Ann. § 402.043 (Vernon 1990), this office requests an opinion from you addressing the charges which may be assessed by Bill Long, Dallas County District Clerk, for copies of documents provided pursuant to requests made under the Open Records Act. Attached are copies of correspondence between Mr. Long and the law firm of Chapman and Reece, as well as the Bar Association's request made to this office.

Also attached is this office's brief addressing this issue, as required by section 402.043. If you desire further clarification, please do not hesitate to contact me.

Yours truly,

John Vance

John Vance
Criminal District Attorney
Dallas County, Texas

JV/sn

cc: Bill Long, District Clerk

Timothy Mountz
Courthouse Committee Chairman
Dallas Bar Association

ACCOMPANIED BY ENCLOSURES — FILED SEPARATELY

FRANK CROWLEY COURTS BUILDING 133 N. INDUSTRIAL BOULEVARD-LB 19 DALLAS, TEXAS 75207-4313 (214) 653-3600

**BRIEF**

**Addressing appropriate charges for documents provided by District Clerks pursuant to a request under the Open Records Act.**

The relevant statutes for consideration are TEX. GOV'T CODE ANN. §51.318 (and its predecessor statutes) and the Open Records Act, TEX. REV. CIV. STAT. ANN. art. 6252-17a, §9 (Vernon Supp. 1991). Also relevant are the guidelines relating to costs established by the State Purchasing and General Services Commission, as required by §9 of the act.

Two principles should be recognized as a preliminary matter. First, if no statute outside of the Open Records Act expressly authorizes a governmental agency to charge a requestor for a copy of a document, then the agency should charge in accordance with §9 of the Act. *Open Records Opinion* 489 (1988). Second, if another statute does set a fee for providing a copy of a document, then the agency should charge the statutorily established fee. Tex. Atty Gen. Opinion MW-163 (1980).

The costs assessed for copies of documents provided by district clerks have been controlled by statute at least as far back as 1901. See TEX. LAWS 1901, Ch. 21, §1, at 25. The 1901 statute allowed the following:

> Making copy of all records of judgments or papers on file in his office, for any party applying for same, with certificate and seal, each 100 words.....15

It is relevant to bear in mind that this statute was written at a time when copying was done by hand with pen and ink. Typewriters were not widespread at that time. Also relevant is the fact that, by 1941, it was recognized that not all copies provided by the district clerk are certified copies. TEX. LAWS 1941, Ch. 387, §1, at 642, provided:

> Making copy of all records, judgments, orders, petitions, pleadings, or papers on file in his office, whether certified or not, for any party applying for same, for each 100 words.....15
> (Emphasis added).

Beginning in 1941, then, the district clerk was required to charge the same fee for both certified and uncertified copies. It is significant that, at that time, the major expense in *reproducing* was still in the actual reproduction, although such was done by typewriter. The effort required for certification was, in most cases, insignificant by comparison.

A 1945 re-enactment left this provision unchanged except to raise the charge to twenty-five cents per 100 words. TEX. LAWS 1945, Ch. 368, §3, at 664.

A 1957 amendment made a slight change in wording but was otherwise the same. See TEX. LAWS 1957, Ch. 433, §1, at 1294.

In 1969, when photocopies were just beginning to gain

> For making a copy of the type described in the preceding item, if the copy is made by a photocopying machine, per page or portion thereof, not to exceed.....1.00 (Emphasis added).

TEX. LAWS 1979, Ch. 295, §1, at 667. Since the price was the same for either reproduction method and was the same as provided in the 1977 enactment, this change was truly a wasted effort. However, if left undisturbed, it would not have upset the basic desirable scheme.

By 1985, the year the new government code was enacted, the duplicity of the 1979 statute was recognized and attempts were made to remove it. In its first attempt at correction (before the government code was enacted), the legislature simply dropped the second part of the ill-considered 1979 provision. Since the provisions were redundant, this must have appeared to be a logical approach. However, the language in the first provision excluding photocopies was not deleted. See TEX. LAWS 1985, Ch. 239, §31, at 1189. The result was a statute authorizing a charge only for copies other than photocopies, an absurd result which surely was not intended.

A few months later and after the government code was enacted, the above statute was repealed. TEX. LAWS 1986 (second called session), Ch. 11, §12, at 28. Unfortunately, the government code adopted substantially this same provision. TEX. LAWS 1985,

Ch. 480, §1, at 1983. Photocopies were still excluded.

It thus appears that the present state of affairs came about because the legislature made a careless mistake while attempting to omit unnecessary language from the statute. Instead of reenacting the desirable 1977 wording, it merely eliminated one of the redundant 1979 provisions without considering the content of the retained provision.

This error was corrected by the current legislature, effective September 1, 1991. However, yet another problem was created by the 1991 act. TEX. LAWS 1991, Ch. 184, §2, at 809, amended §51.318 to provide:

> For a certified copy of a record, judgment, order, pleading, or paper on file or of record in the district clerk's office, including certificate and seal, for each page or part of a page.....1.00
> (Emphasis added).

While the photocopy exclusion was corrected, the 1991 act's applicability is limited to certified copies only, leaving uncertified copies with no Government Code basis upon which to impose a charge. Effectively, then, the 1991 act merely substituted uncertified copies for photocopies as the focal point for controversy. Applying this to our question, while the 1991 act does not provide the fuel for the present disagreement between the

Dallas Bar and the District Clerk, it is very likely to transfer the focus of that disagreement from photocopies to uncertified copies. Further, any analysis to determine legislative intent is applicable to both the 1985 and the 1991 statutes. The following could, therefore, apply to either statute.

Any analysis must begin by recognizing that, unless a fee is provided by law and the amount thereof fixed by law, none can lawfully be charged. Nueces County v. Currington, 162 S.W.2d 687 (Tex. Comm. App. 1942, opinion adopted), at 688. Further, statutes are strictly construed against allowing a fee by implication. Moore v. Sheppard, 192 S.W.2d 559 (Tex. 1946), at 561.[1]

The rules of construction require our courts to engage in the risky presumption that the language in a statute was selected and used with care and that every word or phrase was intentionally used with meaning and purpose. Railroad Commission of Texas v. Olin Corp., 690 S.W.2d 628 (Tex. App. -- Austin 1985, writ ref'd n.r.e.), at 631. Every word excluded from a statute must be presumed to have been excluded for a reason. Morrison v. Chan, 699 S.W.2d 205 (Tex. 1985), at 208. A statute must be presumed to have been enacted by the legislature with complete knowledge of the

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[1] The rules put forth in Nueces County v. Currington and Moore v. Sheppard evolved at a time when a major portion of certain officials' compensation came from the collection of fees. Since this practice has now been severely curtailed by constitutional amendment and by the legislature, there are no new cases on these points. There is no reason against their continued viability, however, and the Attorney General has continued to rely upon them. See, e.g., Texas Attorney General Opinions Nos. H-453 (1984), MW-249 (1980), JM-264 (1984), JM-346 (1985), JM-774 (1987), Open Records Opinion 489 (1988).

existing law and with reference to it. Acker v. Texas Water Commission, 790 S.W.2d 299 (Tex. 1990), at 301. Courts may not choose to redraft legislation just because another version might be more equitable. Defects or deficiencies should be corrected by the legislature and not by the courts. Armstrong v. Harris County, 669 S.W.2d 323 (Tex. App. -- Houston [1st Dist.] 1983, writ ref'd n.r.e.), at 328.

While §311.023 of the Government Code, a part of the Code Construction Act, could be construed as allowing a court to correct an obvious legislative error, the Supreme Court has taken a more restrictive view:

> Although the general aid and guidance of the Code Construction Act ... is applicable to subsequently enacted legislation, it is not designed and should not be construed to engraft substantive provisions onto subsequently enacted legislation when the language, meaning, and interpretation of such legislation are, standing alone, indisputably clear. Thus, the Code Construction Act provides, not rules of substantive law which become part of subsequently enacted legislation, but principles of construction that are necessarily subordinant to the plain intent of the legislature as manifested in the

clear language of (the statute).

Thiel v. Harris County Democratic Executive Committee, 534 S.W.2d 891 (Tex. 1976), at 894.

It appears, then, that until September 1, 1991, any charge for photocopies will have to find its support outside of §51.318 and that, after September 1, 1991, the same must be said of uncertified copies. That support must come from §9 of the Open Records Act and the guidelines promulgated thereunder by the State Purchasing and General Services Commission.

The only observation offered in this brief regarding these guidelines is to note that documents might very well cost more under this scheme than they would under the preferred 1977 scheme. If information is "not readily available," the district clerk may charge the requestor the actual cost of locating and preparing that information, plus a per page charge. The determination of whether information is or is not readily available is left to the district clerk.

In summary, the statutory wording of §51.318 of the Government Code prior to September 1, 1991, does not authorize a charge for photocopies of documents on file with the district clerk. The 1991 amendment to §51.318 corrects this oversight but, inexplicably, authorizes a charge for certified copies only; uncertified copies will not be addressed by §51.318 after September 1, 1991. Any charge made for uncertified copies after that date will be subject only to the charges authorized by §9 of the Open

Records Act.

Respectfully submitted,

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